

STATE OF TEXAS

POLYGRAPH EXAMINERS BOARD



5805 N LAMAR
PO BOX 4087
AUSTIN TX 78773-0001
512/424-2058

FILE # ML39227
I.D. # 39227

WILLIAM H. QUIMBY
Chairman

BOB H. MUSSER
Vice Chairman

MICHAEL C. GOUGLER
Secretary

HORACE ORTIZ
Member

BRAD A. ROGERS
Member

JANET L. BLACKLOCK
Member

Attorney General's Office
Opinion Committee
Box 12548, Capitol Station
Austin TX 78711

RQ-923
October 31, 1996

RECEIVED

NOV 4 1996

Opinion Committee

Dear Sirs/Madams:

The Texas Polygraph Examiners Board would like to ask for an opinion and interpretation of *The Texas Polygraph Examiners Act, Article 4413(29cc) V.T.C.S.* (hereafter referred to as "*The Act*"), *Section 19A, Confidentiality of Examination Results* as it relates to *The Texas Family Code, Subchapter B, Section 261.101. Persons Required to Report; Time to Report*, both of which are detailed below. In addition, The Texas Polygraph Examiners Board seeks an opinion as to how the aforementioned statutes should be read in light of federal constitutional due process rights and the right of an accused to have the assistance of counsel for his defense.

The Texas Polygraph Examiners Act, Article 4413(29cc) V.T.C.S.
Section 19A, Confidentiality of Examination Results

a) *Section 19A. (a) except as provided by Subsection (c) of this section, a licensed polygraph examiner, licensed trainee, or employee of a licensed polygraph examiner may not disclose to another person information acquired from a polygraph examination.*

b) *Except as provided by Subsection (d) of this section, a person for whom a polygraph examination is conducted or an employee of the person may not disclose to another person information acquired from the examination.*

c) *A licensed polygraph examiner, licensed trainee, or employee of a licensed polygraph examiner may disclose information acquired from a polygraph examination to:*

- 1) *the examinee or any other person specifically designated in writing by the examinee;*
- 2) *the person, firm, corporation, partnership, business entity, or governmental agency that requested the examination;*

- 3) *members or their agents of governmental agencies such as federal, state, county, or municipal agencies that license, supervise, or control the activities of polygraph examiners;*
- 4) *other polygraph examiners in private consultation, all of whom will adhere to this section; or*
- 5) *others as may be required by Due Process of Law.*
- d) *A person for whom a polygraph examination is conducted or an employee of the person may disclose information acquired from the examination to a person described by Subdivisions (1) through (5) of Subsection (c) of this section.*
- e) *The board or any other governmental agency that acquires information from a polygraph examination under Subdivision (3) of Subsection (c) of this section shall keep the information confidential.*

Texas Family Code:

SUBCHAPTER B. REPORT OF ABUSE OR NEGLECT; IMMUNITIES

Section 261.101. Persons Required to Report; Time to Report

- a) *A person having cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter.*
- b) *If a professional has cause to believe that a child has been or may be abused or neglected, the professional shall make a report not later than the 48th hour after the hour the professional first suspects that the child has been or may be abused or neglected. A professional may not delegate to or rely on another person to make the report. In this subsection, "professional" means an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, and day-care employees.*
- c) *The requirement to report under this section applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney, a member of the clergy, a medical practitioner, a social worker, and a mental health professional.*

d) The identity of an individual making a report under this chapter is confidential and may be disclosed only on the order of a court or to a law enforcement officer for the purposes of conducting a criminal investigation of the report.

The apparent conflict between these two Texas statutes is further complicated in post adjudication cases because of the "sex offender treatment programs" being mandated by Texas courts as part of an offender's rehabilitation. These sex offender treatment programs generally operate in three phases:

Phase I: The offender admits and accepts responsibility for the actions of the offense he or she has been charged with. It's known as "breaking denial."

Phase II: The offender comes to terms with his or her past. Other assaults, in addition to those for which he or she is currently receiving treatment, are discussed, and prior, unknown victims are revealed. Finally, the offender's sexual deviance is explored. This phase, known as "sexual history," is important because it is used to direct treatment.

Phase III: The offender is monitored to insure there are no new victims and to hold in check any thinking errors. This phase is known as "monitoring."

Only if a sex offender is willing to be monitored after having re-entered society, and only if he or she is willing to disclose all of his or her prior sexual history is that offender considered to be progressing with his treatment. Without that progress, the offender is denied probation or parole status. The offender appears to be faced with a dilemma: reveal one's prior sexual history in order to be considered making rehabilitative progress, but run the risk of being charged for earlier, but as yet undiscovered sexual assaults.

The first question that arises for the polygraph examiner is this: In light of the apparent conflicting obligations enumerated in *Section 19A of the Polygraph Examiner's Act* and *Section 261 of the Family Code*, does a polygraph examiner have a duty to report his or her belief that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect when that belief is based on knowledge acquired during a court-ordered polygraph examination that is part of a sexual offender's treatment program?

The second question is as follows: If the examiner is under a duty to report his or her belief that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect when that knowledge is obtained from statements made by a sexual offender during a polygraph examination, to whom should the polygraph examiner report in order to achieve compliance with the *Texas Family Code*? The *Texas Family Code, Section 261.1030(4)*, states as follows: "A report shall be made to the agency designated by the court responsible for the protection of children." Does a sexual offender's probation or parole officer constitute an "agency designated by the court responsible for the protection of children?" It would appear that not only would the Texas Department of Criminal Justice, Community Justice Assistance Division (probation) and Pardons and Parole Division (parole) be charged with monitoring these offenders in order to protect society, and this would include the children of that society.

Finally, the Polygraph Examiners Board seeks an opinion as to whether or not a polygraph examiner is denying a person's due process rights when conducting a polygraph examination at the request of an attorney, or in the alternative, at the request of non-attorneys?

While these legal issues are being studied, debated, and revised, the polygraph examiners resolve to comply with all laws by the asking of two (2) specific questions:

- 1) In post-adjudicated cases: *"If I report information obtained during the polygraph process to the specific Probation or Parole officer, who is supervising the offender, would that satisfy Section 261.103, sub section (4) of the Texas Family Code?"*
- 2) In pre-adjudicated cases: *"Does due process out weigh Section 261 of the Texas Family Code if the polygraph test is run for an attorney and does the Texas Family Code, Section 261 out weigh The Texas Polygraph Examiners Act, Section 19A?"*

The Polygraph Examiners Board is seeking this opinion in order that the professionals we regulate can continue to protect our law-abiding citizens from the criminal element and help rehabilitate that element for the public's safety.

Sincerely,



Frank DiTucci

Executive Officer

Texas Polygraph Examiners Board